Godell Parking Sdn Bhd v Majlis Bandaraya Petaling Jaya

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(NCVC)(W)-636–11 OF 2018
AHMADI ASNAWI, ABDUL KARIM AND SURAYA OTHMAN JJCA
3 FEBRUARY 2020

Civil Procedure — Pleadings — Parties bound by pleadings — Allegations by appellant not pleaded — Whether appellant bound by its own pleadings

Contract — Construction of clause — Interpretation — Parties entered into concession agreement ('CA') — Dispute over exclusivity of concession areas — Whether there was breach of CA in respect of appellant's exclusivity of concession areas being the sole and exclusive concession holder pursuant to cll 2.1 and 3.3(d) of the CA — Whether the CA could be terminated without prior recourse to mandatory mediation process under cl 11

The appellant had entered into a concession agreement ('the CA') with the respondent to run the street parking collection system ('the collection system') in the city of Petaling Jaya. Under the CA, the appellant was required to pay a monthly rental of a certain amount to the respondent until the expiry of the concession period. Due to the appellant's failure to pay the monthly rentals in full starting March 2016, the respondent issued three notices of default requiring the appellant to rectify the default. The respondent subsequently terminated the CA due to the appellant's failure to rectify the default. The appellant then filed an action against the respondent contending that the said termination of the CA was unlawful and demanded the payment of RM21,190,530.76 as damages due to the alleged unlawful termination. The respondent on the other hand counterclaimed for a sum of RM5,271,390.70 being the outstanding monthly rental charges owing by the appellant to the respondent. The High Court judge found in favour of the respondent, hence, the present appeal. The issues for the court's determination in the appeal were: (a) whether there was a breach of the terms of the CA by the respondent in respect of the appellant's exclusivity of the concession areas being the sole and exclusive concession holder pursuant to cll 2.1 and 3.3(d) of the CA; and (b) whether the CA could be terminated without prior recourse to mandatory mediation process under cl 11. In respect of the second issue, the respondent submitted that in issuing the notice of termination of the CA, they were in fact acting under the provision of cl 10 of the same, which was independent of cl 11.

Held, affirming the High Court's decision, and dismissing the appeal with

costs of RM50,000 subject to the payment of allocatur fee:

(1) The appellant's pleaded cause of action was premised on its allegation that the respondent had unlawfully terminated the CA, causing the appellant to suffer huge losses. The appellant's cause of action was not anchored upon the alleged breach of cll 2.1 and 3.3(d) committed by the respondent. The alleged breach was utilised to justify the appellant's failure to meet its monthly rental commitments. The appellant was thus bound by the terms of its own pleading. The law is trite that the court should not decide a case on a cause of action that was not pleaded (see paras 45 & 48).

(2) Under the CA (in particular cll 2.1 and 3.3(d)), the respondent's obligation was only to offer new parking areas to the appellant subject to the condition that the appellant was prepared and willing to commence the operation, management and maintenance of the new areas within a reasonable time. Once the appellant had expressed its inability to take over new parking areas or had rejected an offer to manage a newly *gazetted* parking area, the respondent was then at liberty to decide how it wished to manage the new parking areas. Further, it would not be just to allow the appellant after a lapse of more than six years to insist that the respondent had been in continuous breach of cll 2.1 and 3.3(d) of the CA. Based on the above reasons, the court held that the respondent had not breached the appellant's exclusive right as the sole and exclusive concession holder of the concession area pursuant to cll 2.1 and 3.3(d) of the CA (see paras 51, 54 & 59).

(3) The operationality of cl 10 was not dependent upon observance of cl 11. Both clauses were stand-alone clauses that operated independently of each other. Nothing would have barred the respondent from exercising its powers under cl 10 to issue the notices of default and thereafter to proceed with the issuance of the notice of termination in the event of non-compliance of the said notices of default in total disregard of cl 11 (see para 89).

(4) A pre-requisite for the invocation of the cl 11 procedure was the existence of a dispute. If there was no dispute between the parties then there was nothing that could be referred to the said dispute resolution procedure. Thus, there could be no dispute on the validity of the exercise of the respondent's right to terminate the CA pursuant to cl 10 until such termination had in fact occurred. In all the circumstances of the case, the respondent had properly applied cl 10 to terminate the CA without the need to have prior recourse to cl 11. Verily the termination was lawful (see paras 100 & 109).

[Bahasa Malaysia summary

Perayu telah menandatangani perjanjian konsesi ('PK') dengan responden untuk menjalankan sistem pengumpulan bayaran tempat parkir jalanan ('sistem pengumpulan') di Petaling Jaya. Di bawah PK, perayu dikehendaki membayar sewa bulanan dalam jumlah yang tertentu kepada responden sehingga tamat tempoh konsesi. Oleh kerana perayu gagal membayar sewa bulanan sepenuhnya mulai Mac 2016, responden mengeluarkan tiga notis ingkar yang menuntut perayu untuk membetulkan kegagalan. Responden kemudiannya menamatkan PK kerana kegagalan perayu untuk membetulkan kegagalan. Perayu kemudian memfailkan tindakan terhadap responden dan mendakwa bahawa penamatan PK tersebut tidak sah dan menuntut bayaran sejumlah RM21,190,530,76 sebagai ganti rugi kerana penamatan yang didakwa melanggar undang-undang. Responden sebaliknya menuntut balas sejumlah RM5,271,390.70 sebagai caj sewa bulanan yang belum dijelaskan oleh perayu kepada responden. Hakim Mahkamah Tinggi memberikan keputusan yang memihak kepada responden, oleh itu, rayuan semasa. Isu-isu untuk penentuan mahkamah dalam rayuan semasa adalah: (a) sama ada terdapat pelanggaran terma-terma PK oleh responden berkenaan dengan hak eksklusif perayu terhadap kawasan konsesi sebagai pemegang konsesi tunggal dan eksklusif menurut klausa 2.1 dan klausa 3.3(d) PK; dan (b) sama ada PK boleh ditamatkan tanpa menggunakan proses mediasi mandatori di bawah klausa 11. Mengenai isu kedua, responden berhujah bahawa dalam mengeluarkan notis penamatan PK, mereka sebenarnya bertindak berdasarkan peruntukan klausa 10 yang tidak terikat dengan klausa 11.

Diputuskan, mengekalkan keputusan Mahkamah Tinggi dan menolak rayuan dengan kos RM50,000 tertakluk kepada bayaran alokatur:

(1) Kausa tindakan perayu yang diplidkan adalah berdasarkan kepada dakwaannya bahawa responden telah menamatkan PK secara tidak sah, menyebabkan perayu mengalami kerugian besar. Kausa tindakan perayu tidak disandarkan pada dakwaan pelanggaran klausa 2.1 dan 3.3(d) yang dilakukan oleh responden. Dakwaan pelanggaran tersebut digunakan untuk menjustifikasikan kegagalan perayu untuk memenuhi komitmen sewa bulanannya. Oleh itu, perayu terikat dengan terma-terma plidingnya sendiri. Telah menjadi undang-undang yang mantap bahawa mahkamah tidak boleh memutuskan sesuatu kes atas kausa tindakan yang tidak diplidkan (lihat perenggan 45 & 48).

(2) Di bawah PK (khususnya klausa 2.1 dan 3.3(d)), kewajipan responden hanya untuk menawarkan kawasan parkir baru kepada perayu tertakluk kepada syarat bahawa perayu telah bersedia dan sanggup untuk memulakan operasi, pengurusan dan penyelenggaraan kawasan baru tersebut dalam masa yang munasabah. Apabila perayu menyatakan ketidakmampuannya untuk mengambil alih kawasan parkir baru atau

menolak tawaran untuk menguruskan kawasan parkir yang baru yang telah *diwartakan*, responden kemudiannya berhak untuk memutuskan bagaimana pihaknya ingin menguruskan kawasan parkir baru tersebut. Seterusnya, adalah tidak adil untuk mahkamah membenarkan perayu berhujah bahawa responden telah terus menerus melanggar klausa 2.1 dan 3.3(d) PK setelah selang waktu lebih dari enam tahun. Berdasarkan alasan-alasan di atas, mahkamah berpendapat bahawa responden tidak melanggar hak eksklusif perayu sebagai pemegang konsesi tunggal dan eksklusif di kawasan konsesi berdasarkan klausa 2.1 dan 3.3(d) PK (lihat perenggan 51, 54 & 59).

(3) Penguatkuasaan klausa 10 tidak bergantung pada pematuhan klausa 11. Kedua-dua klausa tersebut adalah klausa yang berdiri sendiri yang beroperasi secara bebas antara satu sama lain. Tidak ada yang dapat menghalangi responden untuk menggunakan kuasanya di bawah klausa 10 tanpa mengendahkan langsung klausa 11 untuk mengeluarkan notis ingkar dan setelah itu meneruskan dengan pemberian notis penamatan sekiranya tidak mematuhi notis ingkar tersebut (lihat perenggan 89).

(4) Prasyarat untuk menggunakan prosedur di bawah klausa 11 adalah kewujudan perselisihan. Sekiranya tidak ada perselisihan antara pihak-pihak maka tidak ada yang dapat dirujuk kepada prosedur penyelesaian perselisihan tersebut. Oleh itu, tidak ada perselisihan mengenai kesahihan pelaksanaan hak responden untuk menamatkan PK menurut klausa 10 sehingga penamatan tersebut benar-benar berlaku. Dalam semua keadaan kes, responden telah menggunapakai klausa 10 dengan tepat untuk menamatkan PK tanpa perlu menggunapakai terlebih dahulu peruntukan klausa 11. Sesungguhnya penamatan tersebut adalah sah (lihat perenggan 100 & 109).]

Cases referred to

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

Delta Enterprises Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd & Anor [2005] 3 MLJ 293; [2004] 2 MLRA 462, CA (refd)

SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464; [2016] 1 CLJ 177, FC (folld)

Safety Insurance Company Sdn Bhd v Chow Soon Tat [1975] 1 MLJ 193, FC (refd)

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016)
Limitation Act 1953 s 6
Local Government Act 1976

Appeal from: Civil Suit No BA22-NCvC-546–09 of 2017 (High Court, Shah Alam)

K Selva Kumaran (Yau Jie Luan with him) (Rose Hussin) for the appellant.
Kenny Chan Yew Hoong (Yatiswara Ramachandran and Shafrina Mohd Shahidan with him) (Azman Davidson & Co) for the respondent.

Ahmadi Asnawi JCA:

[1] The parties will be referred to as they were in the court below where the appellant herein, Godell Parking Sdn Bhd, was the plaintiff and the respondent, Majlis Bandaraya Petaling Jaya was the defendant.

[2] The plaintiff is a company incorporated under the Companies Act 1965, and was in the business of operating, maintaining and managing street parking and off street parking bays/areas.

[3] The defendant is a local government established under the Local Government Act 1976, and is the local government for the city of Petaling Jaya.

[4] By a letter of offer dated 26 May 1998, the State Government of Selangor offered the plaintiff to take over the street parking collection system (collection system) in the city of Petaling Jaya.

[5] The plaintiff accepted the offer and on 10 September 1998 entered into a memorandum of understanding with the State Government of Selangor to take over the said collection system.

[6] Subsequently on 5 August 1999, the plaintiff entered into a concession agreement ('CA') with the defendant to run the collection system for a period of 20 years, commencing from 1 January 2000 (see — pp 1–70, Vol 1, common core bundle of documents ('CCBD')).

[7] Pursuant to cl 2.4.1 of the CA, the plaintiff shall pay a monthly rental of a certain amount to the defendant until the expiry of the concession period.

[8] The monthly rental rate was computed based on the number of parking bays operated, managed and maintained by the plaintiff during the particular month.

[9] The monthly rental was required to be paid by the plaintiff not later than the 15th day of each month.

[10] In addition, pursuant to cl 2.5.1(a) of the CA, the monthly rental for each of the parking bay rendered unusable shall be waived, proportionate to the number of days the parking bays were obstructed.

[11] There appeared to be issues with the plaintiff's failure to pay up the said monthly rentals in full beginning March 2016.

[12] Consequently, three notices of default were issued by the defendant to the plaintiff, the first dated 29 August 2016 (at pp 135–140, Vol 1, CCBD); the second notice was dated 22 February 2017 (at pp 216–221, Vol 1, CCBD) and the third one being on 24 May 2017 (at pp 235–240, Vol 1, CCBD) wherein the defendant specified that:

(a) the plaintiff had failed, refuse and/or neglected to make full payment of the monthly rental in breach of cl 2.4 of the CA. The accumulated outstanding rental due to the defendant as at 24 May 2019 stood at RM6,948,108.94;

(b) the appellant failed, refused, and/or had neglected to maintain the parking equipment and facilities in the parking areas under its management, including the P&D system in breach of cll 2.1, 3.2(a) and 5.2(b) of the CA; and

(c) the plaintiff had failed, refused and/or had neglected to maintain the marking lines of the parking bays and the parking signage in the parking areas under its management in a good and visible condition in breach of cll 5.2(a) and (c) of the CA.

[13] The plaintiff was given 15 days from the date of receipt of the said notice of default (24 May 2017) to rectify the default.

[14] As was with the previous notices, on 5 June 2017 the plaintiff responded that the said notice of default was unlawful and unsustainable due to the defendant's antecedent breaches of cll 2.1, 3.3(d), 3.3(e) and 6.2 of the CA, that is to say:

(a) the defendant's alleged lack of enforcement activities;

(b) the defendant's alleged breach of the CA by managing new parking areas on its own although the parking areas were within the concession areas under the CA; and

(c) the defendant's failure to maintain a committee pursuant to cl 4.5 of the CA, causing the plaintiff not having a platform to discuss and solve issues pertaining to the parking system with the defendant.

[15] Following the failure of the plaintiff to rectify the said defaults within

A the period stated therein, on 22 June 2017 the defendant terminated the CA vide notice of termination (dated 22 June 2017) pursuant to cl 10.3.1 of the CA (see pp 261–261, Vol 1, CCBD).

B **[16]** On 10 August 2017, the plaintiff through its solicitors, countered that the said termination of the CA was unlawful and demanded the payment of RM21,190,530.76 as damages due to the alleged unlawful termination (see letter at pp 272–274, Vol 1, CCBD).

C **[17]** The defendant denied the said allegation on 11 August 2017 and counter demanded a sum of RM5,271,390.70 being the outstanding monthly rental charges owing by the plaintiff to the defendant (see pp 275–276, Vol 1 CCBD).

D **[18]** On 21 September 2017, the plaintiff commenced an action against the defendant in the High Court, the gist of which is the allegation that the said termination of the CA was unlawful on account of the issues enumerated in para 14 above. The plaintiff claimed damages for the alleged loss of profit suffered by it due to the alleged unlawful termination of the CA.

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[19] It was also the plaintiff's allegation that the defendant had failed to refer the parties' dispute to the State Government of Selangor for mediation before terminating the CA pursuant to cl 11 of the same. Hence, it was the plaintiff's allegation that the defendant's notice of termination did not comply with the

F aforesaid requirement of the CA.

[20] In essence, the plaintiff claimed, amongst others:

(a) a declaration that the termination of the CA between the plaintiff and

G defendant is unlawful and void;

(b) special damages amounting to RM21,190,503.76;

(c) general damages;

(d) exemplary damages; and

H

(e) interest on the damages at a rate of 5% from date of judgment until full settlement.

I **[21]** The defendant had also mounted a counter claim against the plaintiff for the outstanding monthly rentals due to them under the CA, the particulars of which are shown at para 27(a)–(h), pp 122–124 *rekod rayuan* ('RR'), *Bahagian* A, in particular the sum of RM5,681,334.29 (made up of RM7,457,735.89 in respect of outstanding monthly rentals and RM409,943.59 in late payment interest as at 2 November 2017 and less

RM2,186,345.19 for the encashment of the three bank guarantees and forfeiture of cash deposit provided by the plaintiff pursuant to cll 2.2 and 2.3 of the CA).

DECISION OF THE HIGH COURT

[22] The learned trial judge found that cl 11 of the CA was not a pre-condition to the issuance of notice of termination. Instead, the pre-conditions were: (a) the occurrence of the default(s) set out in cl 10.1(a) of the CA; and (b) the issuance of the notice of default by defendant requiring the plaintiff to rectify the said default(s).

[23] The learned judge also found that the plaintiff had defaulted and failed to pay the monthly rentals in breach of cl 2.4.1 of the CA. In fact the learned judge found that the appellant had admitted that at least RM5,021,132.73 were undisputedly due and owing by it to the defendant.

[24] The learned judge also found that:

(a) the plaintiff had failed to ensure that the pay and display system ('P&D') was in manageable, operational, functional and good condition;

(b) the plaintiff had failed to maintain the marking lines of the parking bays and parking signage in the parking areas in a good and visible condition;

(c) there was no evidence to show that the defendant was lacking in enforcement activities;

(d) there was nothing in the CA suggesting that it is mandatory for the defendant to set up committee meetings with the plaintiff. This matter also had nothing to do with enforcement activities or payment of the rental under the CA;

(e) there was no breach of cll 2.1 and 3.3(d) of the CA by the defendant when it took over the management of the new parking areas within the concession area on or about March 2011. This matter is also barred under s 6 of the Limitation Act 1953; and

(f) the plaintiff had failed to comply with the notice of default and the notice of termination was hence validly issued by the defendant.

THE APPEAL BEFORE US

[25] The plaintiff raised only two issues:

(a) whether there is a breach of the terms of the CA by the defendant in respect of the plaintiff's exclusivity of the concession areas being the sole and exclusive concession holder pursuant to cll 2.1 and 3.3(d) of the CA? and

(b) whether the CA can be terminated without prior recourse to mandatory mediation process under cl 11 of the CA of the dispute forming the basis of the notice of termination and the actual termination thereafter?

First issue

Exclusivity of the concession area

[26] The plaintiff submitted that its main ground of appeal is primarily based upon the contention that the defendant has breached cll 2.1 and 3.3(d) of the CA.

[27] Clause 2.1 of the CA states that:

> 2.1 Grant of Concession
>
> Subject to the terms and conditions of this Agreement and the provisions of the Act and the Company's compliance with those terms, conditions and provisions, the Council hereby grants the Company the sole and exclusive rights to take over the operation management and maintenance of the Parking Places, the Parking Bays thereof and the available parking facilities therein in accordance with this Agreement and to that end, the Company is entitled to:
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> (a) Carry out the Installation Works;
>
> (b) Test and commission any New Facilities and the Existing Facilities;
>
> (c) Demand, collect and retain the Charges from the customers;
>
> (d) Make any recommendations to the Council on any matters which may benefit the Council, the Company and the customers without any obligation on the Council to accept such recommendations; and
>
> (e) Do all other matters or things as may be necessary or incidental to the matters referred to in paragraphs (a), (b), (c) and (d) subject to the Council's approval which approval shall not be unreasonable withheld.
>
> For and within the Concession Area and during the Concession Period and in return, the Company shall pay the Council's Consideration at the time and in the manner referred to in Clause 2.4.

[28] Meanwhile, cl 3.3(d) provides:

> 3.3 Council's Covenants.
>
> The council hereby undertakes:

(a) ...

(b) ...

(c) ...

(d) Not to contract out to any other parties the operation and management of any Parking Bays or Parking Places or grant similar concession rights to any other persons or parties after the Effective Date until the Concession Expiry Date; and ...

[29] Based upon the clauses referred to above, it is the contention of learned counsel for the plaintiff that the plaintiff has been awarded an exclusive right to operate, manage and maintain the facilities and services of the parking system (in the concession area) whereupon the defendant thence has no right to take over new parking areas, within the said concession area.

[30] Hence, it is the plaintiff's case that the defendant has in fact breached its obligation under the CA when it took over the new parking areas within the concession area in March 2011, in contravention of cl 2.1 of the CA.

[31] The chronology of the events leading to the defendant's move to take over the new parking areas started when the defendant issued a letter to the plaintiff dated 22 April 2010 (at pp 75–76, Vol 1, CCBD) requesting the plaintiff to operate and implement the parking system in the new parking areas within the concession area (see Government *Gazette* dated 29 April 2010 at pp 77–80, Vol 1, CCBD, for its location).

[32] The plaintiff responded by letter dated 3 May 2010 (at pp 81–84, Vol 1, CCBD) that a detailed research was required to be done and suggestions of actions to be taken before the implementation of the parking system in the new parking areas.

[33] Down the timeline the plaintiff had also suggested to commence the implementation of the parking system in the new parking areas in July 2011.

[34] Subsequently the defendant issued a letter dated 6 July 2010 (at pp 107–108, Vol 1, CCBD) informing the plaintiff that its proposal to only commence the implementation of the parking system in the new parking areas in July 2011 was rejected.

[35] The plaintiff in its reply dated 9 July 2010 (at pp 109–113, Vol CCBD) had further informed the defendant that it could not implement the parking system in the new parking areas because most of the areas were yet to be *gazetted*.

[36] Notwithstanding the same, the defendant proceeded to take over the operation, management and maintenance of the new parking areas in March 2011.

[37] It was the plaintiff's submission that they were not informed that it was too late for the plaintiff to take over the new parking areas in July 2011.

[38] The plaintiff was also not informed of the reason of rejection of its proposal to operate and manage the new parking areas in July 2011.

[39] Also, it was contended that the plaintiff's suggestion on the implementation of the parking system in the new parking area was defined to be not reasonable by the defendant.

[40] It was also submitted that the defendant had taken approximately nine months to fully implement the parking system in the new parking areas (in March 2011) which was not much different from the plaintiff's suggested timeline to implement the system in July 2011.

[41] The plaintiff equally submitted that there is a public policy that the grantor of the concession cannot simply take over bits and portions of the concessions as it will deter future investment by potential concession holders.

[42] It was finally submitted that the plaintiff have never rejected the defendant's request to take over the new parking areas within the concession area. In fact the plaintiff was ready and willing to take over the new parking areas. The defendant in fact had breached cll 2.1 and 3.3(d) of the CA upon which the plaintiff was granted the sole and exclusive concession holder of the parking areas under the CA. The defendant cannot take over the new parking areas within the concession area in any event.

[43] Hence, it was submitted that the learned trial judge erred when he found that the plaintiff had refused to take over the new parking areas — see para 41, grounds of judgment, at p 73, *RR* (*Bahagian* A).

[44] Further it was contended that the defendant was in continuous breach of cll 2.1 and 3.3(d) of the CA. Whilst conceding that the plaintiff's right to damages may be limited to the last six years prior to the commencement of the action, the cause of action continues to be alive for so long as the defendant continued to be in breach of the said provision of the CA.

Our decision in respect of the first issue

[45] We were with the learned counsel for the defendant's submission that the allegation that the defendant had breached cll 2.1 and 3.3(d) of the CA was not raised as a separate and independent cause of action. Instead, the plaintiff's pleaded cause of action was premised on its allegation that the defendant had unlawfully terminated the CA, causing the plaintiff to suffer huge losses. Paragraph 19 of plaintiff's statement of claim ('SOC') (at p 88, *RR* (*Bahagian* A)) is clearly on point. It states:

> 19. Akibat penamatan Perjanjian Tersebut secara salah oleh Defenden, Plaintiff telah mengalami kerugian yang mana butirannya ada seperti pada penyata Butir-Butir Kerugian.

[46] The allegation that the defendant had breached cll 2.1 and 3.3(d) of the CA was only raised by the plaintiff to explain why it could not meet the monthly rental payments that was due to the defendant under the CA. Paragraphs 9–10 of the plaintiff's SOC specifically plead the alleged breach and its effect upon the plaintiff's financial position.

[47] Paragraphs 9 and 10 of the SOC states:

> 9. Defenden sebaliknya telah melakukan pelanggaran atau kemungkiran Perjanjian Tersebut, secara berterusan antara lain seperti berikut:
>
> a. ...
>
> b. Defenden telah, sejak 2011, menguruskan beberapa tempat letak kereta di Petaling Jaya walau pun ianya di kawasan yang diperuntukkan dalam konsesi perjanjian tersebut dan perjanjian tersebut belum luput tempohnya;
>
> c. ...
>
> 10. Akibat kegagalan dan kemungkiran yang dinyatakan di atas, plaintiff telah mengalami kerugian dalam bentuk pengurangan hasil dari operasi letak kereta. Ini menjejaskan kemampuan plaintiff membuat bayaran sewa tetap kepada defenden di bawah perjanjian tersebut.

[48] Clearly, the plaintiff's cause of action was not anchored upon the alleged breach of cll 2.1 and 3.3(d) committed by the defendant. The alleged breach was utilised to justify the plaintiff's failure to meet its monthly rental commitments. The plaintiff is thus bound by the terms of its own pleading. The law is trite that the court should not decide a case on a cause of action that was not pleaded.

[49] The undisputed facts showed that the plaintiff's offer to start operating, managing and maintaining the new parking areas effective from July 2011 was

rejected by the defendant. The offer by the defendant was made in April 2010. Presumably the defendant could not wait that long in the interest of the public. Hence, what are the options now available to the defendant?

[50] We were again with the defendant's submission that it could not be the correct legal position that the defendant could not create new parking areas under the CA if the plaintiff for one reason or another, was not able to comply with the defendant's request to operate new parking areas in the concession area within a reasonable time.

[51] We opined that under the CA (in particular cll 2.1 and 3.3(d)), the defendant's obligation is only to offer new parking areas to the plaintiff subject to the rider that the plaintiff is prepared and willing to commence the operation, management and maintenance of the new areas within a reasonable time. What is deemed to be a reasonable time is a question of fact. It is dependent upon many factors and, in our view it is best left to the wisdom of the defendant to determine so, regard being had to all the circumstances of the case. It cannot therefore be the law that the defendant is compelled to wait until the plaintiff is ready or willing to take over the management of the said new parking areas. Once the plaintiff, for one reason or another, had expressed its inability to take over new parking areas or had rejected an offer to manage a newly *gazetted* parking area, the defendant is now at liberty to decide how it wished to manage the new parking areas.

[52] In our view, the plaintiff's contention that there was a continuous breach of cll 2.1 and 3.3(d) of the CA on account of the defendant's failure or refusal to hand over the management of the said new parking areas to the plaintiff has no basis in law. The contention is untenable following the fact that there was no such refusal or failure by defendant in the first place.

[53] We agreed that the defendant took over the management of the new parking areas only because of the plaintiff's failure or inability to do so within a reasonable time upon being so requested by the defendant. The defendant had to carry out the management of the new areas by itself in mitigation of the plaintiff's failure or inability to take over the same within a reasonable time when requested to do so by the defendant. It looks like the plaintiff itself was in breach of the CA on account of its failure to comply or honour the requirements of the terms of cll 2.1 and 3.3(d) of the CA.

[54] It is worthy to note that after the defendant took over and managed the new parking areas in March 2011, the plaintiff never raised any issue or disclosed any intention to re-take over the said parking areas. The issue of the said purported breach by the defendant in taking over the management of the new parking areas was only raised more than six years later vide the plaintiff's

letter dated 13 September 2016 (at pp 141–166, Vol 1, CCBD). Even so, there is no allegation in this letter of a continuing obligation on the part of the defendant to hand over the said parking areas to the plaintiff nor any demand or intention to re-take over the said parking areas. It would not be just to allow the plaintiff after a lapse of more than six years to now insist that the defendant has been in continuous breach of cll 2.1 and 3.3(d) of the CA. From the facts, such claim appears most likely to be an afterthought.

[55] On the plaintiff's contention that the 13 new parking areas that it was requested to take over had not be *gazetted*, the Government *Gazette* dated 29 April 2010 revealed that in fact all the said 13 new parking areas had all been *gazetted* on the same instant (29 April 2010). This is nearly three months before the plaintiff's letter dated 9 July 2010, highlighting and complaining that the new parking areas had not been *gazetted*. The said *gazette* is at pp 77–80, Vol 1, CCBD.

[56] The plaintiff also submitted that the defendant did not inform the plaintiff of the reason why its proposal to implement the parking system in the new parking areas was rejected. The defendant's letter dated 6 July 2010 made it clear that the plaintiff's proposal to implement the collection of fees at the new parking areas from July 2011 was rejected by the defendant.

[57] In our view, the plaintiff's letter or reply dated 9 July 2010 clearly showed that the plaintiff was aware that the reason for the rejection was due to the late implementation of the parking system at the new parking areas when the plaintiff said that they could not hasten the said implementation on account that most of the areas has yet to be surrendered to the defendant and equally, has yet to be *gazetted*. In the same vein the plaintiff had also said that they were prepared '... untuk mengemukakan cadangan pelaksanaan kepada Majlis bagi kawasan-kawasan yang telah diwartakan dengan cadangan tarikh pelaksanaan yang lebih awal ...'. The said letter by the plaintiff verily is self-revealing, that is to say, the plaintiff was aware of the reasons why its proposal to implement the parking system at the new areas in July 2011 was rejected by the defendant.

[58] The plaintiff obviously did not plead the public policy issue that the grantor of the concession cannot simply take over bits and portions of the concession area less it will deter future investments by potential concession holders. Neither was the same raised before the High Court nor raised in the plaintiff's memorandum of appeal. In such event it is highly irregular for the plaintiff to ventilate the same before us at this stage.

[59] For all the reasons given, we opined that there is no basis in the plaintiff's contention that the defendant had breached the terms of cll 2.1 and

3.3(d) of the CA when it took over the operation and management of the new parking areas. The defendant has not breached the plaintiff's exclusive right as the sole and exclusive concession holder of the concession area pursuant to the said clauses.

Second issue

Unlawful termination of the CA

[60] Now, the plaintiff submitted that there existed real disputes in respect of issues relating to: (a) the payments of monthly rentals in breach of cl 2.4 of the CA; (b) issues of maintenance of parking equipment and facilities and the P&D system in breach of cll 2.1, 3.2(a) and 5.2(b) of the CA; and (c) issues of maintenance of marking lines of the parking bays and parking signage in breach of cll 5.2(a) and (c) of the CA. These were the issues leading to the issuance of the several notices of default by the defendant.

[61] According to the plaintiff, since disputes have arisen, it follows that the same should and must be resolved pursuant to the mechanism set out in cl 11 of the CA. Hence, according to the said clause, the defendant must first refer the disputes to the State Government for its resolution. Any move by the defendant to terminate the CA without first referring the disputes to the State Government would amount to a breach of cl 11(b) of the CA, rendering the said termination unlawful.

[62] The defendant denied the allegations as in para [60] above and also denied that the reference of disputes between the parties to the State Government under cl 11 is a pre-condition required to be fulfiled before default and termination notices can be issued against the plaintiff under cl 10 of the same.

[63] Learned counsel for the plaintiff submitted that in response to the notices of default issued by the defendant, the plaintiff had through its solicitors, vide letters dated 6 March 2017 (at pp 222–223, Vol 1, CCBD) and 5 June 2017 (at pp 241–252, at p 251, Vol 1, CCBD) invited the defendant to refer the said disputes to the State Government of Selangor pursuant to cl 11 of the CA.

[64] Subsequently the plaintiff had unilaterally referred the disputes to the State Government vide its letter dated 6 June 2017 (at pp 1586–1600, Vol 7, *RR*). By letter dated 21 June 2017, the State Government then sought the co-operation of the defendant to comply with the said cl 11. However, there was no response from the defendant.

[65] Nevertheless, the defendant, through its letter dated 22 June 2017 (at pp 253–260, Vol 1, CCBD) replied to the plaintiff's letter dated 5 June 2017, denying the alleged breaches and registered its refusal to refer the so called disputes to the State Government.

[66] Further, on the same day, the defendant issued a notice of termination (letter dated 22 June 2017 at pp 261–262, Vol 1, CCBD) to terminate the CA if the plaintiff failed to rectify the defaults within 15 days of receipt of the said notice.

[67] The plaintiff responded, vide its letter dated 3 July 2017 (at pp 1629–1630, Vol 7, *RR*), amongst others, again urging the defendant to refer the disputes to mediation as required by cl 11 of the CA.

[68] The defendant in its reply vide letter dated 7 July 2017 (at pp 1633–1637, Vol 7, *RR*) again denied that there is a dispute in relation to the issues culminating in the issuance of both notice of default and notice of termination and maintaining its position that the termination of the CA is valid and the plaintiff is at liberty to refer the said termination to the State Government if the plaintiff had wanted to dispute the said termination.

[69] It was hence the plaintiff's case before us that the termination of the CA is unlawful because the notice of termination was issued without first resolving the disputes between the parties amicably by referring the same to mediation as provided under cl 11 of the CA.

[70] However, the defendant is adamant that in issuing the notice of termination of the CA, they were in fact acting under the provision of cl 10 of the same, which is independent of the long arms of cl 11.

[71] In view of the divergence, the court's main poser to both sides of the divide is this: whether cl 10 is a stand-alone clause, independent of cl 11 of the CA and whether, before termination is made, a dispute within cl 11 should mandatorily be referred to the State Government.

[72] For ease of reference, we reproduce the relevant portions of both the clauses.

[73] Clause 10 provides:

> 10.1 Default of the Company.
>
> Save as otherwise provided in this agreement, if:
>
> (a) The company:

(i) fails to comply with any of the terms and conditions of this agreement herein, or

(ii) fails to take over the Existing Facilities on the Takeover Date;

(iii) fails to pay the monthly rental specified in the Agreement;

(b) the Company:

(i) has a winding up order made against it; or

(ii) becomes insolvent or compounds with or makes arrangements with its creditors, or goes into liquidation whether voluntarily (save for the purpose of permitted amalgamation or reconstruction) or compulsorily; or

(iii) was a provisional liquidator, receives and/or manager appointed in respect of its business or undertaking or possession of its property is taken by or on behalf or creditors or debenture holders secured by a floating charge, then the provisions of clause 10.2 shall apply.

10.2 Default Notice

10.2.1 Occurrences of Events other than insolvency.

Upon occurrences of any if the events set out in paragraph (a) of clause 10.1, the Council may give notice in writing to the Company (hereinafter referred to as the 'Default Notice') specifying the default and requiring the Company to remedy the default within fifteen (15) day after receipt of the Default Notice or such other reasonable period as specified in the notice as may be determined by the Council.

10.2.2 Insolvency of the Company.

Upon occurrences of any of the events set out in clause 10.1 (b), the Council may at its absolute discretion either:

(a) forthwith terminate this agreement; or

(b) give notice in writing to the Company (hereinafter referred to as the 'Default Notice') specifying the default and require the Company to remedy the default within fifteen (15) days or such longer period as may be determined by the Council.

10.3 Failure to remedy default.

10.3.1 If the Company fails to remedy the default specified in the Default Notice, the Company shall terminate this Agreement after the expiry of fifteen (15) days from the date of expiry of the Default Notice.

10.3.2 Where this Agreement is terminated by default of the Company under this section, the possession of the facilities available in the parking bays shall be taken over by the Council and shall not be removed by any other party without prejudice however to the rights of Council to take action against the Company for breach of this Agreement herein.

10.3.3 The Council shall have the right to the continued use of such facilities unless otherwise sooner removes or replaces by the Council.

10.3.4 Nothing herein shall be construed as an Agreement by the Council to take over the liabilities of the Company as a result of its taking possession of such facilities.

...

[74] Meanwhile cl 11 states:

11. Amicable Settlement.

(a) If any dispute or difference of any kind whatsoever between the parties hereto during the currency of this Agreement, the parties hereto shall first negotiate in good faith with a view to achieve an amicable settlement of the same.

(b) In the event the Parties hereto are unable to achieve any amicable settlement of the matter or dispute, any party hereto shall be entitled by a notice in writing to the other to require the unresolved matter to be referred to the State Government, who shall use all its reasonable endeavours to resolve the disagreement in the best interest of the Parties hereto. PROVIDED ALWAYS that pending the outcome of the decision of the State Government, the parties hereto shall continue with their responsibilities under this Agreement.

(c) If the State Government shall fail to decide on any matter in dispute referred to them under clause 11(b) within ninety days from the date of such referral or such other period as may be agree to by the Parties hereto or either party is not satisfied with the decision of the State Government, then in any such case either party is at liberty to seek recourse through other legal process including referring the matter to arbitration if agreed to by all the Parties hereto to settle the matter or dispute. PROVIDED ALWAYS it is hereby declared and irrevocably agreed to by all the Parties hereto that no party shall be entitled to invoke another process to settle the matter or dispute in question without first having referred the matter or dispute for settlement in accordance with the provisions of clause 11(b) and each party hereto waives its objection as to the enforceability of this clause 11(c) and any claim it may now or hereafter have that this requirement is of no legal effect or force.

Position of the plaintiff

[75] The plaintiff took the position that the court should take a purposive approach on the interpretation of the contract to give plausible commercial sense to the construction of the CA. In fortification thereof learned counsel cited *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597, where the Federal Court held:

[10] ... The role of the court is to interpret the contract in a sensible fashion ... As

Lord Steyn said in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at p 771:

> In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language. In contradistinction to this modern approach Lord Greene MR's judgement in *Hankey v Clevering* [1942] 2 KB 326 is rigid and formalistic.

[76] We were further referred to *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177 where it repeated the principle on the interpretation of the clauses in the agreement set out in *Berjaya Times Squares Sdn Bhd* and added that:

> [41] Thus in addition to the above in interpreting the contract, the court must approach it holistically. No term is to be taken or interpreted in isolation. This canon of construction is so long established it is almost banal. See for instance *Chamber Colliery Ltd v Twyerould [1893]* [1915] 1 Ch 268 (Note):
>
> > ... the application of the well-known (SIC) rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if the interpretation does no violence to the meaning of which they are naturally susceptible.

[77] Following the decision in *SPM Membrane* it was hence the submission of learned counsel for the plaintiff that cll 10 and 11 of the CA should not be read in isolation. Both clauses are dependent upon each other even though the defendant has exercised its rights under cl 10 to issue a notice of termination in the event the plaintiff failed to remedy the alleged defaults after the issuance of the alleged default notice.

[78] It was further submitted that the defendant is entitled to invoke cl 10.2 of the CA in the event of default by the plaintiff and to issue the default notice to the plaintiff for the plaintiff to remedy the default within 15 days upon receipt of the default notice.

[79] It is also submitted that in the event the plaintiff failed to remedy the default within the said 15 days, the defendant is entitled to issue a written notice to terminate the CA if there is no dispute brought up by the appellant.

[80] However, the plaintiff herein had, through letters from its solicitors disputed the various notices of default issued by the defendant and had given

notice to the defendant to refer the dispute to the State Government (see paras 63–68 above). In such event the provision of cl 11(a) should come into play, to be followed by the mechanism in cl 11(b) if the attempts to amicably settle the disputes under cl 11(a) had resulted in failures.

[81] It was further submitted that the defendant is bound by the multi-tiered dispute resolution clause agreed by both the parties. The defendant cannot turn its back on the plaintiff to terminate the CA without first resolving the disputes under cl 11(a) and (b).

[82] It was also submitted that cl 11 of the CA used the word 'shall' instead of 'may', laying down the imperative that the parties are mandatorily obliged to refer the disputes or differences arising during the currency of the CA to the State Government in the event the disputes or differences could not be resolved between the parties amicably. The plaintiff cited *Delta Enterprises Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd & Anor* [2005] 3 MLJ 293; [2004] 2 MLRA 462 in support of its submission. Further, cl 11(b) is a pre-condition to the initiation of any legal proceeding to resolve the dispute or disputes.

The position taken by the defendant

[83] The defendant is on common ground with the plaintiff that the issue as to whether cll 10 and 11 of the CA are dependent upon each other is a question of construction of the CA.

[84] In a nutshell, the defendant submitted that cl 10.3.1 of the CA allows the defendant to terminate the CA if the plaintiff fails to rectify the defaults within the time lines stated in the notices of default issued by the defendant under cl 10.2.1.

[85] It was also submitted that on a plain reading of cll 10 and 11 there is no link between them. There is nothing in cl 10 that requires recourse to be made to the dispute resolution procedure in cl 11 before the CA can be terminated pursuant to cl 10.3.1. If recourse to cl 11 is a condition precedent before the CA could be terminated pursuant to cl 10.3.1, such a requirement would have been expressly spelt out in cl 10.3.1 itself. The fact that it is not, clearly shows that cll 10 and 11 are provisions independent of each other.

[86] The defendant was also in agreement with the plaintiff that 'termination' of the CA does indeed fall within the ambit of 'dispute or difference'.

[87] However, it was the defendant's submission that there can be no dispute concerning the termination of the CA if the termination has not yet occurred.

Hence, there is no necessity for dispute(s) to be referred to the State Government under cl 11 before termination is made under cl 10.1.3. thereof. In fact termination under cl 10 must have occurred first before a dispute concerning the said termination can be referred to the dispute resolution procedure under cl 11.

[88] The termination under cl 10 of the CA could therefore be invoked without reference to the State Government under cl 11 of the same. It is only if the plaintiff were to dispute the said termination that it can be said that there is a dispute that can be referred to the State under cl 11. To interpret otherwise would not have made a commercial common sense of the two clauses.

OUR DECISION IN RESPECT OF THE SECOND ISSUE

[89] We were strongly in full agreement with the construction of cll 10 and 11 of the CA as argued by learned counsel for the defendant enumerated in paras 84–88 above. That would have mirrored our construction of the two clauses. The operationality of cl 10 is not dependent upon observance of cl 11. Both clauses are stand-alone clauses that operate independently of each other. Nothing would have barred the defendant from exercising its powers under cl 10 to issue the notices of default and thereafter to proceed with the issuance of the notice of termination in the event of non-compliance of the said notices of default in total disregard of cl 11.

[90] The only rider is that, going by the proviso in cl 11(c), it would prohibit the parties from commencing an action in court without first having referred the matter to the State Government under cl 11(b). The proviso in cl 11(c) is rather clear. It provides:

> ... PROVIDED ALWAYS it is hereby declared and irrevocably agreed to by all the parties hereto that no party shall be entitled to invoke another process to settle the matter or dispute in question without first having referred the matter or dispute for settlement in accordance with the provisions of clause 11(b) ...

[91] Hence, learned counsel for the defendant brought our attention to the ruling in *Safety Insurance Company Sdn Bhd v Chow Soon Tat* [1975] 1 MLJ 193, where the Federal Court stated:

> While parties cannot by contract oust the jurisdiction of the courts, they can agree that no right of action shall accrue in respect of any differences which may arise between them until such differences have been adjudicated upon by an arbitrator. Such a provision is often termed a 'Scott v Avery' clause ...
>
> ... where a dispute is governed by such condition, an action in respect of that dispute cannot succeed, and no purpose will be served by allowing it to continue ...

[92] In amplification of our views expressed in para 89 (above), the following issues would obviously negate the proposition that cll 10 and 11 of the CA are interdependent.

[93] Firstly, cl 10 clearly requires the defendant to fulfil the conditions precedent embedded therein before the defendant is entitled to terminate the CA. In this regard the learned trial judge is correct in his findings that there are two conditions precedent to be satisfied prior to the issuance of the notice of termination under cl 10.3.1 of the CA, that is to say: (a) the occurrence of the defaults by the plaintiff as specified in cl 10.1(a) or (b); and (b) the issuance of the notice of default under cl 10.2.1 requiring the plaintiff to rectify those defaults. It is pertinent to note that reference of dispute to the State Government under cl 11 is not one of those conditions precedent.

[94] Clause 10 is all about the issue of termination and ceasing of the CA, which is clearly spelt out under cl 10.3.1. The over-arching scheme of cl 10 provided that if the company/plaintiff fails to comply with any of the terms and conditions of the CA or fails to pay the monthly rental specified thereof, then the council/defendant may issue default notice to the plaintiff and thereafter terminate the CA if the plaintiff fails to remedy the default(s) stated in the notice within 15 days of receipt of the said notice (see cll 10.1 and 10.2).

[95] In our view, cl 10 is a contractual termination clause that sets out the procedure for the contractual termination of the CA on account of non-compliance of its terms. There is no requirement for any party to invoke cl 11 before that party/defendant is allowed to terminate the CA (under cl 10.3.1). Clause 10 deals with the defendant's right to terminate the CA and regulate the termination procedure without any reference to cl 11. In a nutshell, at the risk of being repetitive, cll 10 and 11 are independent or stand-alone provisions.

[96] On the other hand, cl 11 is a dispute resolution provision where the Federal Court in *Safety Insurance Company* had termed it as the *Scott v Avery* clause which provides for a dispute to be adjudicated by a specific procedure before any right of action can accrue between the parties.

[97] In the present case, pursuant to cl 11, procedurally the parties are enjoined to firstly negotiate in good faith and settle their dispute or difference amicably, failing which the parties are to refer their dispute to the State Government who shall use its reasonable endeavour to resolve the said dispute within 90 days from the date of referral. Finally, if the State Government shall fail to decide on the matter referred to them, either party is now at liberty to seek recourse through other legal process including litigation or arbitration, if agreed by the parties.

[98] Either party may invoke the dispute resolution procedure in cl 11 of the CA.

[99] By virtue of cl 11(c), the failure of either party to comply with cll 11(a) and (b) would result in the disentitlement of that party to invoke any other legal process to settle their disputes or claims.

[100] In our view, a pre-requisite for the invocation of the cl 11 procedure is the existence of a dispute. If there is no dispute between the parties then there is nothing that can be referred to the said dispute resolution procedure. Thus, there can be no dispute on the validity of the exercise of the defendant's right to terminate the CA pursuant to cl 10 until such termination has in fact occurred.

[101] In a nutshell, the termination under cl 10 must first occur before cl 11 can be invoked to resolve any dispute concerning the termination. If the plaintiff challenges the validity of the termination of the CA pursuant to cl 10, then a dispute with regard to the said termination will arise or has indeed arisen between the parties. Then either party may submit the dispute for resolution in accordance with the dispute resolution procedures in cl 11. The purport of the procedures involved is further indication that cll 10 and 11 cannot be inter-dependent.

[102] Secondly, we also agree with the submission that the entire dispute resolution procedure in cl 11 would require a minimum of 90 days to complete. This would mean that until the dispute resolution procedure is completed, the plaintiff can nonchalantly continue with its default for a period of 90 days and the defendant will not be allowed to take any steps to mitigate the defaults of the plaintiff until the period of 90 days expires.

[103] The defendant is the local authority for Petaling Jaya. It has statutory obligations, duties and responsibilities to the public and must ensure that there are adequate parking facilities within Petaling Jaya for use by the public. It cannot wait 90 days or more for the completion of the dispute resolution procedure before it can take action to address the issues which may arise in respect of the parking facilities.

[104] We are also in agreement that the facts in *SPM Membrane*, the authority relied by the plaintiff, are distinguishable from facts in the present case. In that case, the provisions in dispute were cll 8 and 9 of the agreement between the parties which provide as follows:

> Clause 8 Termination
>
> 8(i) Termination by the State Government

The State Government shall be entitled to terminate this agreement by giving thirty (30) days notice to the company if:

(a) the equity structure and/or the structure of the board of directors of the company is modified without the State Government's written consent within one (1) year of the date of this agreement;

(b) the company is unable to perform its services as provided under the agreement;

(c) the company shall cease to or threatened to cease to carry out its operation or if in the opinion of the State Government, the company is not carrying on its operation with sound financial and commercial standards;

(d) if a receiver and/or manager shall be appointed in respect of the Company's assets or any part thereof;

(e) a petition shall be presented or any order be made or a resolution be passed for the winding up of the company or if the company enters into liquidation whether voluntarily or compulsorily;

(f) at the time it becomes unlawful for the company to perform its obligations under this agreement; (legal proceedings of any kind be instituted against the company;

(g) any judgment is obtained against the company.

[105] Meanwhile, cl 9 provides:

Clause 9 Performance Review

(i) the parties hereby agree that the State Government may at any time during the contract period review the company's performance of its services under this agreement (upon such terms and conditions as the State Government and the company may hereafter agree in writing).

(ii) in the event that the State Government shall determine the company's performance of its obligations under this agreement as unsatisfactory; the company shall be given thirty (30) days to remedy the unsatisfactory situation.

(iii) if the State Government finds the unsatisfactory situation is not remedied at the end of thirty (30) days given under cl 9.2, the State Government shall have the option of treating such unsatisfactory performance as an event of default which entitles the State Government to terminate this agreement pursuant to cl 8.1(b) and accordingly the State Government shall be entitled to all reliefs provided under cl 8.

[106] The respondent in *SPM Membrane* terminated the agreement pursuant to cl 8(1)(b) of the same. It therefore had to establish that the appellant was unable to perform its services in accordance with the agreement. However, the respondent could not have claimed that the appellant was unable to perform its services if it did not invoke the procedure in cl 9 and allow the appellant the

opportunity to remedy the alleged deficiencies in its performance.

[107] Thus the appellant argued that the review procedure under cl 9 had to be invoked first before the respondent could terminate the agreement under cl 8(1)(b). The Federal Court agreed with the appellant and held that cll 8 and 9 of the agreement had to be read together. Consequently cl 9 was a pre condition to the issuance of a notice of termination under cl 8 of the agreement. There is a clear link between cll 8 and 9.

[108] Clauses 10 and 11 in our present case is not in the same mould as in *SPM Membrane*'s case. Clause 10 of the CA has a built in mechanism for the plaintiff to be notified of its defaults and given the opportunity to remedy its defaults before the CA can be terminated. Clause 11 on the other hand is a *Scott v Avery* clause that can be invoked if the termination pursuant to cl 10 is disputed. There is no link between cll 10 and 11 of the CA. Termination under cl 10 must have happened before cl 11 can be invoked to resolve any dispute concerning the termination.

[109] We opined that in all the circumstances of the case, the defendant had properly applied cl 10 to terminate the CA without the need to have prior recourse to cl 11. Verily the termination was lawful.

THE CONSENT JUDGMENT

[110] We took note that a consent order was entered on 15 January 2018 during the pendency of the hearing of the present suit between the plaintiff and defendant in the High Court. The said consent order (dated 15 January 2018) required both parties to refer the disputes in the High Court action to the State Government of Selangor for mediation pursuant to cl 11(b) and (c) of the CA.

[111] The disputes were then referred by both the parties to the State Government of Selangor for the said purpose of mediation.

[112] On 12 April 2018, the State Government of Selangor recommended that the parties proceed with the action in court.

[113] We thus opined that by reason of the consent order dated 15 January 2018 and both the parties participation in the mediation process, the plaintiff cannot now complain of any purported non-compliance with cl 11 of the CA by the defendant.

CONCLUSION

[114] Having considered the facts and evidence in its entirety, we concluded that the plaintiff had failed to prove its case and that the defendant had indeed proven its counter claim. There is absolutely no reason for us to interfere with the findings of the learned trial judge both on the facts and law. Hence, we affirmed the decision of the High Court and correspondingly dismissed the plaintiff's appeal with costs assessed at RM50,000, subject to the payment of the allocatur fee. Order accordingly.

High Court's decision affirmed; appeal dismissed with costs of RM50,000 subject to payment of allocatur fee.

Reported by Dzulqarnain bin Ab Fatar